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No. 95-1494

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GERALD FRANK STANLEY, *Petitioner*,

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
W. SCOTT THORPE
Supervising Deputy Attorney General
RUTH M. SAAVEDRA
Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5248
Counsel for Respondent

QUESTIONS PRESENTED

1. Is a trial court constitutionally barred from appointing a separate attorney for a defendant who believes he is competent to stand trial to present this position to a jury in a competency proceeding, even if original defense counsel remains in the case and presents all available evidence of incompetency?

2. Does the California statutory definition of incompetency to stand trial, with which the jury was instructed in this case, satisfy the minimum definition of incompetency set out in *Dusky v. United States*, 362 U.S. 402 (1960)?

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PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

OPINION OR JUDGMENT BELOW

Petitioner, Gerald Frank Stanley, seeks review of the opinion of the California Supreme Court in *People v. Stanley*, 10 Cal.4th 764; 42 Cal.Rptr.2d 543; 897 P.2d 481 (1995). Petitioner's Appendix pp. 13-139.[1] The court in this opinion affirmed Petitioner's judgment of death entered on February 7, 1984 in Butte County Superior Court No. 79825.[2] Petitioner's Appendix at pp. 5-12.

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1. Petitioner raises no issues relating to the guilt or penalty phases of his trial. The competency issues raised herein, are addressed in the California Supreme Court's opinion at 10 Cal.4th 801-807, 815-818 [Petitioner's Appendix pp. 57-68, 83-88].

2. Venue was ordered changed from Lake County because of pretrial publicity.

STATEMENT OF THE CASE

Proceedings Leading To The Competency Hearing At Issue

On July 22, 1983, after a six month trial, the jury returned verdicts finding petitioner guilty of the 1980 first degree murder of his fourth wife (Cal. Pen. Code, § 187) with the special circumstances of lying in wait (Cal. Pen. Code, § 190.2(a)(10)) and intentionally killing a witness to a crime for the purpose of preventing her testimony (Cal. Pen. Code, § 190.2(a)(10)), with the additional finding that he personally used a firearm (Cal. Pen. Code, § 12022.5). He was also found guilty of arson of an occupied dwelling (Cal. Pen. Code, § 451) and burglary of an occupied trailer coach (Cal. Pen. Code, § 459). CT 4297-4307.

On August 2, 1983, in a trial partially tried to a jury and partially tried to the court, the jury found true a third special circumstance, that petitioner had been previously convicted of second degree murder (Cal. Pen. Code, § 190.2(a)(2)). The court found petitioner had served a prior prison term and did not remain free of custody for five years (Cal. Pen. Code, § 667.5(b)). CT 4386-4388.

From August 2, 1983 to August 10, 1983, the prosecution presented a penalty phase case in support of the death penalty which included the circumstances of the 1975 murder of petitioner's previous wife, the uncharged murder of a nineteen-year-old woman committed the day before the charged murder and other crimes including rape, attempted rape, brandishing a deadly weapon and various misdemeanors involving threats of violence. RT 19929-19951, 19971-19981, 20015-20019, 20033-20034, 20053-20103, 20164-20166, 20131, 20173-20216, 20255-20270, 20296-20302, 20350-

20356, 20361-20371, 20441-20449, 20461-20508, 20523, 19940-19944, 20020-20026, 20156-20158, 20057-20051, 20167-20171.

On August 15, 1983, the defense portion of the penalty phase began with petitioner's family members testifying that they loved appellant, that petitioner loved his children and that he had a difficult childhood because of a harelip for which he had several surgeries. RT 21045-21054, 21450-21452.

The testimony of three psychiatrists from petitioner's 1975 trial on petitioner's state of mind prior to the 1975 murder was read into the record. RT 21890-21959, 22117-22140, 22153-22215, 22289-22290, 22301.

The testimony of various family members and a pharmacy employee from a 1983 proceeding at which the trial jury was not present, was read into the record in regard to petitioner's beer drinking and use of prescription drugs prior to the 1980 murder. RT 22306-22439, 25810-25874, 25880-25891.

In the afternoon of August 15, defense counsel informed the court that petitioner was not cooperating with them in relation to the presentation of the testimony of defense expert Dr. Axelrad.[3] Petitioner and both his counsel agreed that petitioner was competent and had the capacity to cooperate but that he would not. RT 21041.

On August 18, 1983, defense counsel, for the first time in three years of proceedings, suggested that petitioner might be incompetent to rationally assist counsel. The court found no substantial evidence of incompetence. CT 4446-4447; RT 21356-21359. Defense

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3. Petitioner had been assured at the time he spoke to Dr. Axelrad and submitted to a lengthy narco-hypnotic interview that everything would be privileged and would not be used in his defense without his consent. RT 24389-24391, 24577.

counsel raised the competency issue again on August 22, 1983, and again the court found no substantial evidence of incompetence. CT 4446-4447. On August 26, 1983, Dr. Axelrad testified in camera that in his opinion petitioner was unable to rationally assist counsel. The court, as it was legally required to do[4] under California law, suspended proceedings pending determination of petitioner's competence. RT 22444-22492.

The matter was transferred to another court for a jury trial on the issue of competency. After the court ascertained that petitioner believed he was competent and did not wish to proceed with the competency trial, the court offered to appoint associate counsel to represent petitioner's view that he was competent. With petitioner's personal agreement, and no objection from trial counsel the court appointed contract public defender Donald Blake. Trial counsel Petersen and Neill remained to present the case for incompetency. RT 225449, 22558-22559.

The Competency Hearing Evidence

Trial counsel Petersen and Neill presented the following evidence of incompetency:

Neill testified that until August 8, 1983, he himself had believed that the taped interviews petitioner refused to allow into evidence contained prejudicial matter which the jury should not hear.[5] However, he

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4. The opinion of one mental health professional that a defendant is incompetent to stand trial requires the court to suspend proceedings until the matter is litigated in a competency proceeding even if there is overwhelming contradictory evidence and the court does not personally have a doubt as to the defendant's competence. *See Pate v. Robinson*, 383 U.S. 375 (1966); *People v. Stankewitz*, 32 Cal.3d 80; 648 P.2d 578 (1982).

5. The prejudicial information included the suspected homicide

was now convinced that without Dr. Axelrad's evidence, the verdict of death was certain because the prosecution's evidence was devastating. Neill testified that petitioner's refusal to waive his psychotherapist-patient/attorney-client privileges was irrational because petitioner told them he wanted the jury to return a verdict of life imprisonment. Neill testified petitioner had wanted Axelrad to testify when he believed Axelrad would testify that he was innocent. Petitioner did not want him to testify he had mental disorders consistent with having committed the offenses. RT 23825-23858, 24512-24513, 24549, 24572-24573. However, there was no rational reason for not using the evidence. Neill testified that he believed petitioner's refusal was based on irrational motives such as wanting to take back control of his case, rather than concern about adverse legal consequences. RT 24713-24714, 24723-24725, 24735.

Neill further testified that petitioner had been competent throughout the proceedings until he refused to allow Axelrad's evidence. RT 24323-24376, 24382-24410, 24421-24423, 24426-24445, 24484. Neill believed there was no question that petitioner understood the nature of the proceedings. The issue was whether he was able to cooperate and, if not, whether the inability was the result of a mental disorder. RT 24690.

Neill testified he would believe petitioner competent if he either waived his privileges to allow Axelrad to testify at trial [which petitioner ultimately did]

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of petitioner's third wife with which he had never been charged, the nature of the charges brought against him by the wife he had murdered to prevent her testimony (assault, and forcible sex crimes), a stabbing incident against his father and an attempt to choke his mother. RT 24512-24513, 24549, 24572-24573.

or made a rational decision that he wanted the death penalty. RT 24781-24783.

The approximately 13 hours of taped hypnotic and narco-hypnotic interviews which petitioner refused to allow at trial were played for the competency jury. RT 23887-24301.

Finally, Dr. Axelrad testified that in his opinion petitioner was incompetent. He had administered two competency assessment tests to petitioner. The results were marginal and lent themselves to a finding of competency or incompetency. While he believed petitioner was incompetent due to paranoia, it was so close that Axelrad was glad the jury had to make the decision. RT 24934. Axelrad also testified that petitioner's competence ultimately depended on what happened between petitioner and his attorneys. RT 24935.

In support of petitioner's position that he was competent, associate counsel Blake presented the testimony of a jailer and a former cellmate who testified concerning petitioner's ability to communicate rationally, to understand jail rules, to file grievances and to use law books to prepare a number of petitions for writs. RT 25249-25265.

The district attorney presented the following evidence in support of the People's position that petitioner was competent:

Two psychiatrists (one selected by the defense) who had examined petitioner for the specific purpose of determining competence, testified that he was competent and was not incompetent because of any paranoid condition. RT 25273-25236, 25391-25435.

The jail captain testified concerning petitioner's rational communication and lack of bizarre behavior. RT 25352-25355.

The Competency Trial Verdict

On November 17, 1983 the jury returned with a unanimous finding that petitioner was competent. CT 4580, 4599-4600.

The Resumption Of The Criminal Proceedings

On December 5, 1983, the penalty trial resumed with presentation of additional defense evidence. Petitioner waived his privileges and allowed Dr. Axelrad to testify and show the jury the 12 to 13 hours of the video-taped narco-hypnotic interviews. RT 22675-22685; 23887-24302.

On December 28, 1983, the jury returned a verdict of death. CT 4875-4876, 4948.

ARGUMENT

I.

APPOINTING A SEPARATE ATTORNEY TO PRESENT EVIDENCE OF COMPETENCY FOR A DEFENDANT WHO BELIEVES HE IS COMPETENT, DOES NOT VIOLATE DUE PROCESS WHEN ORIGINAL DEFENSE COUNSEL REMAIN IN THE CASE AND PRESENT THE FULL CASE FOR INCOMPETENCY

In his first argument, petitioner argues that allowing a defendant in a competency proceeding to have associate counsel appointed to present evidence in support of his personal position that he is competent, violates his right to due process and to effective assistance of counsel by creating a conflict in his representation. Petitioner makes this argument despite the fact that this procedure does not result in the suppression of any evidence of incompetency.

Respondent submits that appointing additional counsel to present a defendant's personal assertion that he is competent does not violate his rights to due process and to effective representation of counsel. Petitioner does not adequately explain why procedures which protect a defendant's right to have a factfinder make a determination of competency based on presentation of all relevant evidence on all sides of the question, would be inadequate under *Drope v. Missouri*, 420 U.S. 162, 172 (1975) and *Pate v. Robinson*, *supra*, 383 U.S. at p. 378, which require procedures adequate to protect a defendant's right not to be tried while incompetent.

Petitioner does not deny that petitioner's original two trial counsel, Petersen and Neill, presented

all available evidence of their client's alleged incompetency. Nor does he deny that Petersen vigorously cross-examined all witnesses who testified petitioner was competent. He does not claim that Petersen and Neill had any divided loyalties or conflicting financial interests. He simply contends that the appointment of additional counsel created a per se conflict in his representation. Petitioner's argument relies on the fallacious assumption that a defendant has no protectable interest in being found competent, even if he is actually competent and an invalid finding of incompetence will result in confinement in a mental hospital with his criminal case unresolved.

Petitioner argues that once trial counsel, supported by one mental health expert, opines that a defendant is incompetent to stand trial, incompetency is the only defense position that may be argued by a defense representative, regardless of the client's own personal views or the weight of evidence supporting the defendant's protests that he is competent.[6] Petition at

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6. Petitioner's argument is that once a prima facie case of incompetency is established, only attorneys prepared to advocate competency could represent petitioner. Petition p. 18. Respondent reiterates that establishment of a prima facie case requires only the opinion of one mental health specialist and does not indicate that the case for incompetency is compelling in relation to the case for competency. The court is not allowed to weigh conflicting evidence in determining whether an evidentiary proceeding must be held. See *People v. Pennington*, 66 Cal.2d 508, 518; 426 P.2d 942 (1967). Respondent does agree that it would violate due process to allow a possibly incompetent defendant to suppress evidence of incompetency. Once the question of competency is properly raised, the factfinder should hear relevant evidence on both sides. Allowing a defendant to suppress evidence of incompetency once a prima facie case for incompetency has been made would undermine the factfinding process and allow a possibly incompetent defendant to proceed to trial. However, allowing trial counsel to suppress

p. 18.

Respondent submits that the "sides" in a competency hearing cannot always be as well-defined as the sides in a criminal trial. The purpose of a competency proceeding is to determine whether or not a defendant is competent to stand trial. Both the defendant and the People have an interest in seeing that an incompetent person is not forced to stand trial while he is incompetent. The California legislature acknowledged the People's interest by allowing the prosecution to offer evidence of a defendant's incompetence if the defense does not choose to do so. Cal. Pen. Code, § 1369, subd. (b)(2). Set out in full in Petitioner's appendix, pp. 151-153.

The issue of a defendant's competency can be raised not only by the defendant himself, but also by the prosecution and on the court's own motion. *Brown v. Warden, Great Meadow Correctional Facility*, 682 F.2d 348, 353 (2d Cir.) cert. denied 459 U.S. 991 (1982).

The California courts have also recognized that a defendant who wishes to testify at a competency proceeding in support of his competency cannot be silenced by counsel who are presenting the case for incompetency. *See People v. Harris*, 14 Cal.App.4th 984 (1993); *People v. Conrad*, 132 Cal.App.3d 361 (1982); *People v. Bolden*, 99 Cal.App.3d 375, 379-380 (1979).

When a defendant is accused of a crime, it is generally the duty of his attorney to present a vigorous defense to the end that the defendant might be found not guilty, or guilty of a lesser offense only. A criminal defendant has a legal interest in being found not guilty, whether he is guilty or not. However, the defendant in a competency proceeding not only has the right not to

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evidence of competency on a difficult but possibly competent defendant would also subvert the factfinding process.

be tried for a criminal offense when he is incompetent, but has an interest in not being sent to a mental institution with his pending criminal case unresolved, if he is competent. The same due process principles that protect an incompetent defendant from standing trial, also protect the competent defendant's right to proceed to trial expeditiously. *United States v. Holmes*, 671 F.Supp. 120, 123 (D.Conn. 1987) aff'd 867 F.2d 1425 (2d Cir. 1988). The appointment of associate counsel Blake served this latter interest. To assert that Blake undermined the defense position, presupposes that petitioner was incompetent, the very thing the proceeding was designed to decide.

By appointing Blake as associate counsel, the trial court ensured that all available evidence on every side of the issue would be put before the jury. Although the district attorney presented evidence of incompetence, he could only do so from the point of view of someone without a confidential relationship with petitioner. He could not speak on behalf of petitioner. Petitioner could not have been expected to confer with him. Only someone with a confidential attorney/client relationship with petitioner was able to present evidence or cross-examine witnesses based on knowledge gained from petitioner himself.

The appointment of additional counsel for a defendant who believes he is competent is a procedure approved in *Mason v. Vasquez,* 5 F.3d 1220 (9th Cir. 1993).[7]

In *Mason*, the issue was whether Mason was competent to waive his right to collateral federal

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7. Respondent does not suggest, and the *Mason* court did not hold, that appointment of additional counsel was constitutionally mandated. That issue need not be addressed to resolve the questions raised here and neither party has attempted to do so.

proceedings. As in the instant case, Mason's original defense counsel (Marson) supported the position that Mason was incompetent. Marson established a prima facie case of incompetency by presenting evidence to the federal district court in the form of declarations from three mental health experts that Mason was incompetent. An evidentiary hearing was held to determine whether petitioner was competent. As in the instant case, the district court granted Mason's request to have an additional attorney to represent his personal view that he was competent. At the competency hearing, all counsel took part. Mason's original attorney presented the case for incompetency, Mason's new attorney represented Mason's personal case for competency and the State Attorney General presented the State's case for competency. Mason himself was also allowed to take part. *Id.* at 1221-1223.

The district court entered an order finding Mason competent. Mason dismissed the counsel who had advanced the case for incompetency and requested dismissal of the previously filed petition for writ of habeas corpus. *Id.* at 1221. The Ninth Circuit Court of Appeals affirmed the actions of the district court.

In its opinion, the Court of Appeals noted that Mason's originally appointed attorney properly contested Mason's competency based on counsel's belief that he had an ethical obligation and was acting in the best interest of his client. However, the court also noted that Mason was entitled to guide the course of his litigation if he was mentally competent to do so. *Id.* at 1223. The court commended the district court judge for the manner in which the proceedings in the district court were conducted.

> All interested parties were able to present all relevant evidence. Mason was afforded counsel of his choice to represent his point of view and

> he, [original counsel Marson], and the State's Attorney were each given full opportunity to examine the witnesses. The district judge thoroughly and carefully questioned Mason himself.

Id. at 1224.

The proceedings in the instant case were similarly to be commended. All interested parties were able to present all relevant evidence. The jury in the competency proceeding was able to make its decision based on evidence which would have been unavailable had petitioner not been allowed to present evidence of his own competence.

To accept petitioner's argument that the appointment of associate counsel Blake interfered with his rights to a competency proceeding or negated or diluted the efforts of Petersen and Neill would be to prejudge the issue of petitioner's competence. In appointing separate counsel to represent petitioner's point of view, the trial court, like the district court in *Mason v. Vasquez, supra,* acted to resolve a conflict, not create one. In so doing, it permitted the jury to hear every side of the issue of defendant's competence, thereby assuring petitioner a fair trial. Petitioner may have gotten more than he was entitled to, but his due process rights were not violated.

In any event, as petitioner was not prejudiced by the procedure used, reversal would not be required. Even if a procedural error in the conduct of a competency hearing results in the denial of a federal constitutional right, the error is harmless pursuant to *Chapman v. California*, 386 U.S. 18, 21-22 (1967) if the state can prove that the defendant was, in fact, competent at the time of trial. *See Sturgis v. Goldsmith*, 796 F.2d 1103, 1109 (9th Cir. 1986) in which the defendant was denied his constitutional right to be

present when the issue of his competency was determined on a submission of doctors' reports.

In the instant case, the record clearly shows that petitioner was competent when the penalty phase resumed after the competency jury found him competent.

The only question presented to the competency jury was whether petitioner's refusal to allow Axelrad to testify was both irrational and the result of a mental disorder. At all times, without exception, during testimony and argument, it was represented to both the court and jury by Petersen and Neill that if petitioner would allow the presentation of Axelrad's evidence, he would be competent.[8] The chain of facts necessary to a finding of incompetency relied completely on this simple factual link. Once petitioner changed his mind and allowed the evidence, this factual link was broken and no finding of incompetency is possible.[9]

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8. Defense counsel Petersen and Neill represented to the trial court, and presented testimony at the competency proceedings, which showed that petitioner's ability to understand the nature of the proceedings was not at issue. RT 24690, 21338-21358, 21416-21417, 21360-21361, 21464, 21555. Neill testified that although petitioner had been difficult to work with at times, he had been able to assist counsel in the conduct of the defense in a rational manner throughout the trial until he refused to allow Dr. Axelrad to testify for the defense at the penalty phase of the trial. RT 24323-24376, 24382-24410, 24421-24423, 24426-24445, 24577, 24484, 24661, 24686-24689. Neill testified that he would believe petitioner was competent if he would waive his privileges and allow Axelrad to testify. RT 24781-24783. Axelrad testified that petitioner's paranoia caused him to irrationally refuse to allow the evidence but that petitioner's competence would ultimately depend on what happened between petitioner and his attorneys. RT 24935, 25001.

9. Axelrad's testimony in the penalty phase can be found at RT 26064-26110, 26121-26152, 26193-26389. The video tapes transcribed in RT volumes 121-124 were also played for the jury. RT 26165-26182. Prior to contemplation of any need for

In addition, the evidence of incompetency was quite weak. Three psychiatrists testified. The two appointed to consider the issue of competency only (one of whom was picked by the defense) both testified that petitioner did not suffer any mental disorders which rendered him incompetent. Axelrad testified that petitioner was incompetent but that his assessment was so close that he was glad the jury had to make the ultimate decision. (See the summary of evidence from the competency proceeding in respondent's statement of the case above.)

In summary, the evidence of petitioner's incompetency was weak at best and depended exclusively on petitioner's refusal to allow Dr. Axelrad's evidence at the penalty trial. Once petitioner cooperated with counsel and allowed the evidence to be presented, all foundation for a competency finding disappeared. On this record, any error at the competency trial was harmless beyond a reasonable doubt.

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competency proceedings, the defense represented to the trial court that Dr. Axelrad would be the last defense witness. RT 20582. There were no rebuttal witnesses on either side. RT 25417A.

II.

THE CALIFORNIA STATUTORY DEFINITION OF COMPETENCY IS AN ACCURATE STATEMENT OF THE LAW AND DOES NOT CONFLICT WITH FEDERAL CONSTITUTIONAL STANDARDS

Petitioner contends that the instruction defining incompetency in this case which was based on California's statutory definition violated the constitutional test for competency set out in *Dusky v. United States*, 362 U.S. 402 (1960).

Respondent submits that the instructions given in this case, including the one based on the California statutory definition of incompetency, did not conflict with Federal Constitutional standards merely because different but comparable wording was used.

In *Dusky v. United States, supra* at 402, this Court stated:

> It is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events, but that the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as a factual understanding of the proceedings against him.

The jury in this case was instructed in accordance with the *Dusky* mandate, albeit not in the exact words used by this Court.

As part of the preliminary instructions, the jury was instructed:

> In this proceeding, you are to decide whether or not the defendant is mentally competent to be tried for a criminal offense.

> This proceeding is not in any sense a criminal proceeding, and the innocence or the guilt of the defendant of the criminal charges against him is not involved here nor is the question of his legal insanity at the time of the commission of the offense involved.
>
> Although on some subjects, his mind may be deranged or unsound, a person charged with a criminal offense is deemed mentally competent to be tried for the crime charged against him one, if he is capable of understanding the nature and the purpose of the proceedings against him; and two, if he comprehends his own status and condition in reference to such proceedings; and three, if he's able to assist his attorney in conducting his defense in a rational manner.

(RT 23821.)

As part of the final instructions, the jury was reinstructed with the first paragraph quoted above and with a paragraph adapted from the California statutory definition[10] of incompetency as follows:

> A person cannot be tried or adjudged to punishment while such person is mentally incompetent. A defendant is mentally incompetent for purposes of this proceeding if,

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10. At the time of trial, California Penal Code section 1367 provided:

> A person cannot be tried or adjudged to punishment while such person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

> as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

(CT 4595-4596.)

This second paragraph was included in the instructions at the suggestion of defense counsel Neill in response to the district attorney's argument that the preliminary instruction did not properly tie together for the jury the fact that they had to find there was an underlying mental disorder. Neill suggested that the jury be instructed in the statutory language of California Penal Code section 1367 defining incompetency. All counsel and the court agreed with Neill's suggestion. RT 25370-25372.

Petitioner argues that the California statutory definition is deficient in the following respects: He complains that the statutory definition refers to the defendant being "unable to understand the nature of the criminal proceedings" instead of having "a rational as well as factual understanding of the criminal proceedings "against him." He also complains that the statutory definition does not include the requirement that the defendant "comprehends his own status and condition in reference to such proceeding." He further complains that the statutory definition refers to the defendant being able to assist counsel in the conduct of a defense in a "rational manner" rather than being able to consult with counsel "with a reasonable degree of rational understanding."

Respondent submits that petitioner's complaints are singularly without merit. The instructions given the jury did not suggest that they merely had to find petitioner "oriented to time and place" and that he had "some recollection of events" as warned against in *Dusky*.

As the California Supreme Court stated in response to this same argument below, "'To anyone but a hairsplitting semanticist, the two tests are identical.'" *People v. Stanley, supra*, 10 Cal.4th 764, 816 [petitioner's appendix p. 84]; quoting *James H. v. Superior Court*, 77 Cal.App.3d 169, 177 (1978).

First, petitioner fails to suggest any way in which the jury could have been misled by omission in the final instruction of the words "against him" in describing the criminal proceedings petitioner must understand. There were no other criminal proceedings at issue. The jury would surely not believe the instruction referred to proceedings against another defendant. (Respondent notes that the preliminary instructions quoted above did include the phrase "criminal proceedings against him.")

Second, petitioner's claim that the language "comprehends his own status and condition in reference to such proceeding" is required by *Dusky* is without basis. This language, which was in the preliminary instruction given the jury in this case, is not found in *Dusky*. Petitioner has cited nothing else which suggests that the language is mandated by the United States Constitution. In any event, as noted, the preliminary instruction quoted above, included this very language. In addition, a fair reading of the final instruction given here compels the conclusion that the requirement that the defendant "comprehends his own status and condition in reference to such proceedings" is implicit in the California statutory definition given.

Finally, petitioner asserts that the requirement that the defendant be able "to assist counsel in the conduct of a defense in a rational manner" is ambiguous and is not the equivalent of the "twofold" requirement that the defendant have both "a present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational, as well as factual

understanding of the proceeding against him." Petition pp 23-24. Again, petitioner is quibbling.

Respondent submits that the *Dusky* requirement that the defendant have "a rational as well as factual understanding of the proceeding" was adequately covered in the instructions given. The requirement that the defendant be able "to understand the nature of the criminal proceedings" [from the final instruction] or that he be "capable of understanding the nature and the purpose of the proceedings against him" [from the preliminary instruction] could not have misled the jury. There is nothing to suggest the jury believed they could find petitioner competent if he had an "irrational understanding" of the proceedings. The term "understanding" in the context of the statute could only refer to a rational understanding based on the facts. Anything else would be a "misunderstanding."

Respondent further submits that the requirement that the defendant "have a present ability to consult with his lawyer with a reasonable degree of rational understanding" was adequately covered in the instructions by the requirement that he be able to "assist counsel in the conduct of a defense in a rational manner." It would take true "hairsplitting" to find a Constitutionally meaningful difference.

Petitioner has cited no authority for the contention that the term "assist . . . in a rational manner," or any other language in the instructions given was ambiguous. He cites the fact that the jurors asked for a definition of "rationally assist." RT 25637; CT 4581. However, there was nothing in the jurors' request which suggests that the language was ambiguous or that the same type of request would not have been made had they been instructed with the *Dusky* language.

The record suggests that the jurors were looking for guidance on the factual issue of what constituted

rational assistance (or, in the *Dusky* language, what constituted consulting with his attorney with rational understanding). They heard testimony from defense counsel Neill that there was no rational reason not to use the Axelrad evidence. RT 24713-24714, 24723-24725, 24735. They heard testimony from Dr. Whipple that even if petitioner's refusal to waive his privilege was irrational in terms of the trial proceedings, petitioner would still, in Whipple's opinion, be competent, because there was no sign of mental disorder. RT 25348. They heard Neill testify that petitioner understood the proceedings and that his alleged incompetency arose only in regard to Axelrad's testimony. RT 24323-24376, 24382-24410, 24421-24445, 24484, 24690. They also heard him testify to some rational reasons for not wanting Axelrad to testify in that some of the information on the tapes could be prejudicial and that counsel himself had misgivings about using the evidence until toward the end of the penalty phase. RT 24512-24513, 24549, 25472-24573.

It is little wonder that the jury had a question about the whole concept of what was rational in the context of petitioner's relationship with his counsel.

Petitioner's argument boils down to nothing more than legally unsupported semantical nitpicking. As the California Supreme Court found, the differences in wording did not amount to a difference in concept. The instructions given in this case fully informed the jury of their obligations in determining whether petitioner was competent. Nothing in the instructions suggested that they could find him competent based on simple orientation to time and place and some recollection of events. Nothing in *Dusky* or any subsequent case from this Court suggests that any particular form of words be used in advising a jury of the definition of competency or incompetency.

CONCLUSION

For the reasons stated, respondent respectfully requests the petition for writ of certiorari be denied.

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Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
W. SCOTT THORPE
Supervising Deputy Attorney General

RUTH M. SAAVEDRA
Deputy Attorney General
Counsel of Record

Counsel for Respondent

RMS:lmp/lat